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9  
10 **IN THE SUPREME COURT**

11 **STATE OF ARIZONA**

12 In the Matter of:

Supreme Court No. R-22-0022

13 **PETITION TO AMEND RULE 42**  
14 **(ER 1.5), ARIZ. R. SUP. CT.**

**Comment Opposing Petition**  
**to Amend Rule 42 (ER 1.5),**  
**Ariz. R. Sup. Ct.**

15  
16 This rule-change proposal conflates two distinctly different concepts:  
17 payment of a referral fee and dividing or sharing one client fee. Creating a special  
18 rule that would deem one mechanism for paying a referral fee to be like fee division  
19 muddles the two concepts and potentially creates confusion for clients and liability  
for lawyers.

20 ...

1 A referral fee is not fee sharing or fee division; it is essentially lawyer  
2 marketing and has nothing to do with hands-on working on a client matter. Fee  
3 sharing, on the other hand, ensures that the client knows which lawyers are working  
4 on their matter and how two or more different firms will share one fee from the  
client's matter.

5 This Court made this difference clear in the Ethical Rule changes that took  
6 effect January 1, 2021.

7 With the elimination of ER 7.2(b), lawyers now may compensate sources for  
8 referrals. As this Court's Task Force on the Delivery of Legal Services wrote in its  
9 report recommending that change, the prohibition against giving anyone anything of  
10 value for recommending a lawyer's services "exists although there is no quantifiable  
11 data evidencing that for-profit referral services or *even paying for referrals confuses*  
*or harms consumers.*" (Emphasis added.)

12 At the same time, and as the Task Force proposed, the Court revised ER 1.5(e)  
13 to specifically apply only to lawyers in different firms who are "jointly working" on  
a matter and who share one fee.

14 Word choice is important particularly when drafting or proposing rules.  
15 Petition R-22-0022 repeatedly refers to "dividing a fee" or "division of fees" in  
16 describing the situation in which a referral fee is paid to another lawyer or person at  
17 the conclusion of the representation as a percentage of the fee earned by the lawyer  
18 who represents the client. To avoid confusion, the term "division of fees" should  
19 only be used when the situation falls within existing ER 1.5(e): when lawyers from  
20 different firms are "jointly working" on the matter for the client.

Petition R-22-0022's proposed new rule further conflates the two concepts  
depending solely on the mechanism by which a lawyer pays a referral fee. Under

1 this proposed rule, if a lawyer pays a referral fee as a flat amount, say \$100, when  
2 the case is referred by a lawyer or other person, the lawyer need not inform the client  
3 of the payment and it is not considered a “division of a fee.” If that type of payment  
4 doesn’t require disclosure in writing to the client, and consent in a writing signed by  
5 the client, why does a referral fee paid as a percentage of the fee earned by the lawyer  
6 at the conclusion of the representation of the client change the character of the  
7 referral fee into a division of the legal fee? The amount paid, however much and  
8 from whatever source, doesn’t change the reason for the payment: compensation to  
9 a source for referring the matter to the lawyer. If the referral source is a lawyer, that  
10 source has no responsibility or client obligations; she simply sent the potential client  
11 to another lawyer who paid her a referral fee for doing so.

12 If this Court adopts the proposed ER 1.5(f), there may be unintended  
13 consequences for the referring lawyer. Because disclosure in writing and client  
14 consent in a signed writing are required, if the client later decides to sue for  
15 malpractice, why wouldn’t the client’s malpractice lawyer include the referring  
16 lawyer as a possible defendant, at least while discovery is undertaken to determine  
17 whether the referring lawyer had any input into the settlement amount or other  
18 matters? What referring lawyer wants that potential exposure when the referring  
19 lawyer had nothing to do with the actual representation?

20 The petition states, without any evidence, that “dividing a client’s fee with  
someone outside of the firm creates a risk to clients.” Does an upfront payment of  
a \$100 referral fee create risk to the client? The petition speculates that the lawyer  
“may increase overall billings as a means of compensating for the *fee-sharing*  
arrangement.” (Emphasis added.) Again, the payment is a *referral fee* paid at the  
conclusion of representation from the fee earned by lawyer who did the work. *Fee*

1 *sharing* is the situation described in ER 1.5(e) in which lawyers at different law firms  
2 are responsible for doing the work – “jointly working,” as the Court explicitly  
3 recently amended the rule to say – on the client’s case.

4 If the lawyer pays an upfront referral fee of, say, \$1,000 rather than \$100,  
5 doesn’t the lawyer have the same alleged incentive to increase overall billings to  
6 compensate for having paid the referral fee? If the lawyer has an untoward incentive  
7 under that circumstance, the solution is an investigation into whether an ER 1.5(a)  
unreasonable fee has been charged.

8 The petition opines that a client who knows her legal fee will be *divided*  
9 (again, the wrong description of what is happening) with someone outside the firm  
10 will be better equipped to evaluate the settlement offer and the overall  
11 reasonableness of the lawyer’s fees. Why? How? If one accepts the notion that  
12 mere payment of a referral fee impacts the settlement offer or reasonableness of the  
13 overall fee, then the client also should need to be told of an upfront \$1,000 referral  
14 fee. Or even, perhaps, a lawyer’s expenditures for marketing and advertising, all of  
which could, under the same logic, impact a settlement offer or reasonableness of  
the overall fee.

15 Adopting ER 1.5(f) and calling a referral fee paid out of the lawyer’s  
16 contingency fee a “division of a client’s legal fee” makes the situation more  
17 confusing and complicated, not less. It creates a fee purgatory, a netherworld in  
18 which only one specific type of referral fee transforms into a weird version of fee  
19 division, even though the specific type of referral fee does not fit the fee-division  
20 rubric and has nothing to do with working on a client matter. It changes what is  
simply a mechanism for compensating a referral source into something that it is not.

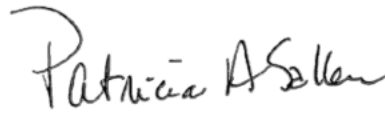
...

1 If this Court has concerns about what the client should know, then, to be  
2 consistent, a lawyer should be required to advise the client any time the lawyer has  
3 paid compensation to anyone, by whatever means, for having referred the client to  
4 the lawyer. Otherwise, this Court is urged to reject Petition R-22-0022.

5 RESPECTFULLY SUBMITTED this 1st day of May, 2022.

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7 Nancy A. Greenlee

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9 Patricia A. Sallen